No. 82-1491

In The

Supreme Court of the United States

October Term 1982

JAMES DYRAL BRILEY,

Petitioner,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether the Jury was properly instructed concerning aggravating and mitigating circumstances.

II. Whether a statement of the Petitioner was obtained by the police in violation of *Miranda*.

III. Whether Jurors were excluded from the Jury Panel in violation of *Witherspoon*.

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JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257 and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in Petition for Writ of Certiorari at 2.

STATEMENT OF THE CASE

The petitioner was convicted by a jury in the Circuit Court of the City of Richmond on January 25, 1980. He was convicted of first-degree murder, robbery, rape, two

charges of capital murder, and the use of a firearm in each of those felonies. On the non-capital felonies the jury imposed sentences totaling life plus sixty-five years. After a separate hearing, the jury returned verdicts imposing the death penalty in both of the capital murder cases. On March 4, 1980, the trial court affirmed the death sentences and entered judgment in accordance with the jury verdicts. All of the convictions were affirmed by the Supreme Court of Virginia on November 26, 1980. *Briley* v. *Commonwealth,* 221 Va. 563, 273 S.E.2d 57 (1980).

A petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Virginia on March 5, 1981 was denied by that court after a hearing on March 13, 1981. The petitioner appealed to the United States Court of Appeals for the Fourth Circuit on March 16, 1981, and on the same date, filed a petition for a writ of habeas corpus in the Circuit Court of the City of Richmond. On March 17, 1981, the Court of Appeals stayed the petitioner's execution, and on April 23, 1981, remanded the case to the District Court with orders to retain jurisdiction and hold the matter in abeyance while petitioner pursued his state habeas corpus remedies.

After oral argument on respondent's motion to dismiss, the Circuit Court of the City of Richmond dismissed all but two of petitioner's habeas corpus claims on September 22, 1981. *See* Petition for Writ of Certiorari at App. B. An evidentiary hearing on the remaining claims was held on December 22 and 28, 1981. After that hearing the Circuit Court dismissed those claims. *Id.* On April 28, 1982, petitioner filed a petition for appeal in the Supreme Court of Virginia. The petition was refused on December 9, 1982. *See* Petition for Writ of Certiorari at App. A.

STATEMENT OF FACTS

At trial, the evidence of the prosecution demonstrated that the petitioner, his two brothers, Linwood and Anthony, and sixteen year old Duncan Meekins were involved in three murders which occurred at a residence in Richmond on October 19, 1979. Those four individuals went to the residence of Harvey Wilkerson to rob him. Once inside they subdued Wilkerson, his common-law wife, Judy Barton, and their five year old son. After the adults were bound with electrical tape, Judy Barton was raped and money was stolen from the premises. According to Meekins, before leaving the residence he shot and killed Wilkerson, and the petitioner shot and killed Judy Barton and the child. Tr. Vol. II at 52, 62-63, 66-68, 386-387, 407. The medical evidence revealed that all three of the victims died of gunshot wounds to the head, Judy Barton having been shot in the head four times. *Id.* at 10-12, 17, 20-23, 25-26.

REASONS FOR DENYING THE WRIT

I.

The Issues Concerning The Constitutionality Of The Jury Instructions On Aggravating And Mitigating Circumstances Are Not Properly Before This Court; The Jury Was Properly Instructed Regarding Aggravating And Mitigating Circumstances.

The petitioner contends that at the penalty phase of his trial the jury was not constitutionally instructed regarding aggravating and mitigating circumstances. The petitioner raised these issues in his petition for a writ of habeas corpus. In his subsequent petition for appeal to the Supreme Court of Virginia, however, petitioner raised these issues only in the context of an allegation that the Circuit Court had erred by dismissing these claims without a hearing. *See*

Assignments of Error from Petition for Appeal appended to this brief at App. A. Respondent asserts, therefore, that the claims are being raised in this Court in a completely different context than that in which they were raised in the Supreme Court of Virginia. Thus the issues are not properly before this Court. *Beck* v. *Washington*, 369 U.S. 541, 550 (1962); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 (1961); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248 (1902).

As to the claim concerning the constitutionality of the jury instructions on aggravating circumstances, the petitioner concedes that the jury found that both aggravating circumstances had been established beyond a reasonable doubt. *See* Petition for Writ of Certiorari at 11, and App. C. Petitioner raised the issue of the adequacy of the jury instructions regarding aggravating circumstances in the petition for a writ of habeas corpus appeal, but he did so only in the context of an allegation concerning the "outrageously or wantonly vile. . ." aggravating circumstance. At no time in the original petition or the petition for appeal to the Supreme Court of Virginia did petitioner raise a claim challenging the adequacy of the jury instructions concerning the "future dangerousness" aggravating circumstance. Respondent asserts, therefore, that this latter claim is not properly before this Court. *Beck, supra; Godchaux, supra.*

Since the claim regarding the "future dangerousness" aggravating circumstance is not properly before this Court, even if, *arguendo,* the jury instruction regarding the "outrageously or wantonly vile. . ." aggravating circumstance were constitutionally inadequate, such error would be harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). This is so because the jury found the ex-

istence of both aggravating circumstances. *See Stromberg* v. *California,* 283 U.S. 359, 367-368 (1931).

The respondent submits, nevertheless, that the jury was constitutionally instructed concerning the "future dangerousness" aggravating circumstance. The "future dangerousness" standard is not unconstitutionally vague and does not require specific definition of its meaning. *Jurek* v. *Texas,* 428 U.S. 262, 274-275 (1976). *See also, Gregg* v. *Georgia,* 428 U.S. 153, 183 n.28 (1976).

The petitioner alleges that the jury instructions concerning the "outrageously and wantonly vile. . ." aggravating circumstance were inadequate because they were "virtually identical to those rejected in" *Godfrey* v. *Georgia,* 446 U.S. 420 (1980). On that basis, he claims that the Supreme Court of Virginia erred when it ruled in *Briley, supra* at 579-580; 67, that the jury need not be informed of the limiting construction which the Court has placed upon this statutory phrase. *See* Petition for Writ of Certiorari at 13. Petitioner concedes, however, that the "outrageously or wantonly vile. . ." standard is not unconstitutional on its face. *See Gregg, supra* at 201.

The respondent asserts that the facts of this case make it readily distinguishable from *Godfrey, supra.* In *Godfrey,* the Court did not decide that the jury instructions, which "quoted to the jury the statutory language of the. . .aggravating circumstance in its entirety," were *per se* unconstitutional. *See* 446 U.S. at 426. Nor did the Court decide that the jury must be informed of the limiting construction which has been placed upon the "outrageously or wantonly vile. . ." standard. *See Stanley* v. *Zant,* 697 F.2d 955, 971 (11th Cir. 1983). Rather, the Court ruled that, based upon the particular facts of that case, the Georgia Supreme Court had adopted such a broad and vague con-

struction of the aggravating circumstance that it violated the Eighth and Fourteenth Amendments. 446 U.S. at 423, 432.

The defendant in *Godfrey*, experiencing serious domestic problems with his wife and mother-in-law, went to a trailer where the two women were. He shot his wife in the head through a window and killed her instantly. He then entered the trailer and shot and killed his mother-in-law instantly. The accused then reported the crimes to the police, accepted full responsibility, and described his deeds as a "hideous crime." At trial he asserted the defense of temporary insanity. *See* 446 U.S. at 426.

This Court found that Godfrey's crimes did not indicate that, for purposes of imposing the death penalty, he was any more "depraved" than any other murderer. The Court emphasized the evidence of "extreme emotional trauma," and the fact that Godfrey acknowledged his responsibility for the crimes almost immediately. *Id.* at 433.

In marked contrast to the facts in *Godfrey*, the facts in petitioner's case reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* The evidence demonstrated that during the commission of robbery and rape, the petitioner executed a five year old boy and his mother by shooting them in the head. The mother was shot in the head four times and her skull was almost broken in half. Tr. Vol. II at 20-21.

The accused in *Godfrey* was emotionally distraught and he killed his victims instantly and without warning. Petitioner, however, killed his victims in a cool, calculated manner, and only after they were forced to wait for what they must have known was certain death. *See Briley, supra* at 579; 67. The woman was raped before she was killed, and the child was forced to witness the murder of both his

parents. The accused in *Godfrey* notified the police and accepted responsibility for his crimes. The petitioner, on the other hand, fled from the scene with his accomplices carrying the proceeds of the robbery.

Respondent asserts that the facts of this case amply demonstrate that the Supreme Court of Virginia has not adopted an unconstitutionally broad or vague construction of the "outrageously or wantonly vile. . ." standard. Therefore, petitioner's claim is without merit.

Petitioner's claim concerning the alleged inadequacy of the jury instructions on mitigating circumstances was not raised at trial or on direct appeal. Petitioner did raise the claim in his petition for a writ of habeas corpus, but the Circuit Court denied relief on the grounds that the claim could have been raised at trial and on appeal. *See* Petition for Writ of Certiorari at App. B. In refusing the petition for appeal, the Supreme Court of Virginia specifically stated that the Circuit Court had not erred by applying the procedural default rule. *See* Petition for Writ of Certiorari at App. A. *See also, Slayton* v. *Parrigan,* 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom Parrigan* v. *Paderick,* 419 U.S. 1108 (1975).

Respondent asserts that this claim is not properly before this Court. *Beck, supra; Godchaux, supra.* A state procedural rule which prohibits the raising of federal claims at late stages in a case is a valid exercise of state power. *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977); *Williams* v. *Georgia,* 349 U.S. 375, 382-383 (1955). *See also, Henry* v. *Mississippi,* 397 U.S. 443, 446 (1965).

As to the merits of this claim, petitioner's reliance upon *Lockett* v. *Ohio,* 438 U.S. 586 (1978), is misplaced. In *Lockett,* this Court declared unconstitutional a state statute which severely restricted the number and type of mitigating

circumstances which could be considered by the sentencing authority in a death penalty case. The Court stated, "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608. *See also, Eddings* v. *Oklahoma,* ___ U.S. ___, 71 L.Ed.2d 1 (1982).

In the present case, the petitioner does not, and could not reasonably contend that Virginia's death penalty statute in any way restricts the consideration of mitigating factors by the jury. The relevant statute reads: "Facts in mitigation may include, *but shall not be limited to,* the following: [i through v]." *See* 19.2-264.4(B), Code of Virginia, set forth in Petition for Writ of Certiorari at App. C. (Emphasis added.) Thus the Virginia statute permits the jury to consider any evidence proffered by the defendant in mitigation, and clearly meets the requirements of *Lockett, supra.*

The petitioner's reliance on *Gregg* v. *Georgia,* 428 U.S. 153 (1976), is also misplaced. In *Eddings, supra* at 9, the Court discussed the statute involved in *Gregg* as it related to the issue of mitigating circumstances. The Court stated:

> By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to the characteristics of the person who committed the crime. . . ." (*quoting* 428 U.S. at 197).

Thus, contrary to petitioner's assertion, *Gregg* does not require that the mitigating evidence which may be considered by the jury be defined or explained. To the contrary, any effort to delineate mitigating factors for the jury could run afoul of *Lockett, supra.* If the Constitution requires

that the jury not be precluded from considering *any* evidence in mitigation, there can be no constitutional requirement to inform the jury of the specific types of mitigating evidence which may be considered.

The Virginia death penalty sentencing procedures, like those of Georgia considered by the Court in *Gregg*, permit the jury to consider any evidence in mitigation of the offense, and require that the jury must find and identify at least one statutory aggravating circumstance before it can impose the death penalty. "In this way the jury's discretion is channeled" in a constitutionally acceptable manner. 428 U.S. at 206.

In the present case, petitioner was not restricted in any way from presenting mitigating evidence to the jury, and what mitigating evidence there was, was presented. Habeas Transcript (hereinafter cited as H.Tr.) at 92-93. The trial court correctly instructed the jury that before it could impose the death penalty it was required to find that the prosecution had established beyond a reasonable doubt at least one of the two statutory aggravating circumstances. *See* instructions from sentencing phase set forth in Petition for Writ of Certiorari at App. D. The trial court also correctly instructed the jury that, even if one or both of the aggravating factors had been established beyond a reasonable doubt, the jury should fix the punishment at life imprisonment if it believed "from all the evidence that the death penalty is not justified. . . ." *Id.* After the jury was so instructed, counsel for petitioner were permitted to argue to the jury at length that because of the mitigating evidence it should impose a sentence of life imprisonment rather than death. Tr. Vol. III at 136-144. Furthermore, the verdicts returned by the jury affirmatively stated that before fixing the petitioner's punishment at death, the jury

had found that both statutory aggravating circumstances had been established and that the jury had "considered the evidence in mitigation of the offense. . . ." *Id.* at 147-148.

After the verdicts, the trial court directed a probation officer "to thoroughly investigate. . . the history of the defendant and any and all other relevant facts [so that the court would be] fully advised as to whether the sentence of death is appropriate and just." *See* § 19.2-264.5, Code of Virginia, set forth in Petition for Writ of Certiorari at App. C. After receiving and reviewing the probation officer's report, the trial court affirmed the jury's verdicts. Tr. March 4, 1980 at 20-21. On appeal, the Supreme Court of Virginia, following the mandates of § 17-110.1(C), Code of Virginia, reviewed the death sentences and found that they had not been "imposed under the influences of passion, prejudice, or any other arbitrary factor," and were not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Briley, supra* at 580-581; 68-69. This type of review "affords additional assurance" that the death sentences were imposed upon petitioner with due regard for all the mitigating evidence. *See Gregg, supra* at 207.

Respondent submits that in view of the statutory sentencing procedures that were employed in this case, and the instructions that were given to the jury on the issue of punishment, it is clear that the sentences of death were imposed upon petitioner in a constitutional manner.

II.
Petitioner's Constitutional Rights Were Not Violated By The Police And His Written Statement Was Properly Admitted Into Evidence.

In his petition for a writ of habeas corpus, the petitioner alleged that the trial court improperly admitted into evidence a handwritten statement given by the petitioner to the police on the night of his arrest. Petitioner did not object to the admission of the statement at trial or on direct appeal. The substance of the statement set forth an alibi defense and did not implicate the petitioner in the offenses of which the petitioner was accused. Tr. Vol. II at 244. According to petitioner's trial counsel, the defense did not object to the admission of the statement because it allowed the defense to introduce evidence of alibi, albeit uncorroborated, without the petitioner testifying and being subject to cross-examination and impeachment on the basis of his prior felony convictions. H.Tr. at 361-362, 581-582.

Despite the fact that this issue had not been raised at trial or on direct appeal, the Circuit Court of the City of Richmond conducted on evidentiary hearing to resolve the merits of the claim. On the basis of the evidence adduced at that hearing, the Circuit Court found that the petitioner had been properly advised of his constitutional rights and that he had voluntarily and intelligently waived those rights before he made his written statement to the police. *See* Petition for Writ of Certiorari at App. B. In refusing a petition for appeal, the Supreme Court of Virginia affirmed the ruling of the Circuit Court. *See* Petition for Writ of Certiorari at App. A.

Petitioner contends that the facts adduced at the evidentiary hearing demonstrate that his constitutional rights as set forth in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and

Edwards v. *Arizona*, 451 U.S. 477 (1981), were violated by the police, and that therefore the written statement was improperly admitted into evidence by the trial court. Petitioner focuses upon his own testimony at the evidentiary hearing that immediately after being arrested and advised of his constitutional rights he invoked his right to counsel. Petitioner alleges that both the Circuit Court and the Supreme Court of Virginia "ignored petitioner's request for an attorney, thereby fundamentally missing the point of *Edwards*. . . ." *See* Petition for Writ of Certiorari at 18.

Although the petitioner testified at the evidentiary hearing that after his arrest he requested an attorney, that testimony was completely contradicted by the testimony of the police officers involved in petitioner's arrest and interrogation. The police officers testified that at no time during the arrest or interrogation did petitioner invoke his right to counsel or his right to remain silent. H.Tr. 61, 67-70, 666, 669-670, 673-677. Petitioner's testimony was also significantly impeached by that of his trial attorneys who testified that at no time during the preparation for trial or during the trial itself did the petitioner tell them that he had invoked his right to counsel before making his written statement to the police. H.Tr. 148, 434-435. Although the evidence indicated that after his arrest the petitioner was permitted to make a telephone call and that he called an attorney, there was no evidence that the police knew or should have known whom the petitioner called. H.Tr. 66.

In resolving the conflicts in the testimony, the Circuit Court, as the trier of fact, resolved all issues of credibility adversely to the petitioner. The court stated:

> As to the claim under *Miranda*, the word that first comes to mind is contrived, contrived by this defendant for this hearing. The Court specifically rejects the testi-

> mony of the defendant and accepts the testimony of [the police officers] and the others who testified contrary to the defendant's statements in that regard. (H.Tr. 760.)

The issue of the credibility of the witnesses is one that is properly resolved by the trier of fact. *See Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979). Since the Circuit Court, as the trier of fact, decided the credibility issue adversely to the petitioner, this Court, like the Supreme Court of Virginia, must reject the petitioner's claim that he invoked his right to counsel before making his written statement to the police. *See Marshall* v. *Lonberger,* ____ U.S. ____ (decided February 22, 1983); *Sumner* v. *Mata,* 449 U.S. 539 (1981). When the evidence is viewed in this light, *Edwards, supra,* which involved continued police questioning after the accused asserted his right to counsel, is clearly inapposite.

The testimony of the police officers, which was expressly accepted by the trier of fact, was certainly sufficient to support the finding that petitioner's written statement was obtained in full compliance with *Miranda, supra.* Furthermore, the petitioner himself admitted that he was fully advised of his *Miranda* rights, that he fully understood those rights, including the right to counsel, that he had considerable previous experience with the criminal justice system, and that he wrote the statement in his own handwriting after signing a written waiver form. H.Tr. 78-81. *See* copy of waiver form appended to this brief at App. B. Under these circumstances, any rational trier of fact could have made the finding that the petitioner's constitutional rights were not violated by the police and that his written statement was therefore admissible. *Jackson, supra.*

Respondent asserts in the alternative that, since the written statement did not implicate the petitioner in the offenses

of which he was accused, and since petitioner was convicted primarily upon the independent testimony of an accomplice, Duncan Meekins, if any error was committed in the admission of the written statement, it was harmless beyond a reasonable doubt. *Chapman, supra.* See *Milton* v. *Wainwright,* 407 U.S. 371 (1972).

III.

The Issue Of Alleged Improper Juror Exclusion Is Not Properly Before This Court; Jurors Candies And Revere Were Properly Excluded From The Jury Panel.

As petitioner concedes, the claim that two jurors were improperly excluded from the jury panel was not raised at trial or on direct appeal. *See* Petition for Writ of Certiorari at 5. The claim was raised in the petition for a writ of habeas corpus filed in the Circuit Court, and that court dismissed the claim both on the merits and because it should have been raised at trial and on appeal. *See* Petition for Writ of Certiorari at App. B.

In the petition for appeal to the Supreme Court of Virginia, however, the claim was raised solely in the context of an allegation that the Circuit Court erred by dismissing the claim without a hearing. *See* Assignments of Error from Petition for Appeal appended to this brief at App. A. When the Supreme Court of Virginia refused the petition for appeal, it stated that "the court did not err in finding *from the record* that the rule in *Witherspoon* v. *Illinois,* . . . had been complied with. . . ." *See* Petition for Writ of Certiorari at App. A. (Emphasis added.) By ruling that the Circuit Court did not err by making the finding "from the record," the Court, in effect, ruled that the Circuit Court did not err by refusing to conduct a hearing on this claim.

Petitioner has asked this Court to decide the merits of the claim even though the Supreme Court of Virginia was only asked to decide whether the Circuit Court had erred by refusing to conduct a hearing on the claim. For this reason, respondent asserts that the claim is not properly before this Court. It is a jurisdictional requirement that the federal question which this Court is asked to consider must have been presented to the state's highest court. *Beck* v. *Washington*, 369 U.S. 541, 550 (1962); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 (1961); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248 (1902).

As to the merits of the claim, petitioner contends that the *voir dire* of jurors Candies and Revere does not demonstate the degree of opposition to the imposition of the death penalty required for exclusion under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1967). Witherspoon prohibits the exclusion of venireman "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. A prospective juror may be excluded, however, if he is "irrevocably committed...to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Id.* at n. 21.

A review of the entire *voir dire* of jurors Candies and Revere reveals that they were properly excluded for cause under the *Witherspoon* standard. *See* Petition for Writ of Certiorari at App. E. During *voir dire* the following exchange occurred between the trial judge and juror Candies:

> THE COURT: In other words, in any event, no matter what the evidence, you would not impose the death penalty?

MS. CANDIES: (Shaking head negatively) No.
THE COURT: You would not?
MS. CANDIES: (Shaking head negatively)

(Tr. Vol. I at 48-49.)

When asked by defense counsel if she meant "that, under no circumstances, no matter what the evidence is, that you couldn't impose the death penalty?" Candies responded, "This is the way I feel right now." Tr. Vol.I at 49. Even when defense counsel cited an extremely aggravated example, and asked Ms. Candies if she could not impose the death penalty even if the evidence was "so overwhelming" and "stacked up high as the sky," she responded, "I don't think I could."

During the *voir dire* of juror Revere, after she had indicated to the trial judge that her opposition to the death penalty would cause her to "hang the jury" rather than vote to impose the death penalty (Tr. Vol.I at 133), the following exchange occurred between defense counsel and the prospective juror:

MR. HAYES: Mrs. Revere, are you saying that no matter how bad or how gross a particular case was, that there is no way you could impose a death sentence?
MS. REVERE: Well, I say rather than the death sentence, I don't say turn him out, but punish him.

(Tr. Vol.I at 134.)

Respondent asserts that the record amply demonstrates that Candies and Revere were excluded for cause only after they made it "unmistakably clear" that they would not vote to impose the death penalty under any circumstances. *Witherspoon, supra* at 522 n.21. *See also, Boulden* v. *Holman,* 394 U.S. 478, 482 n.6 (1969). For this reason, peti-

tioner's claim that the jurors were improperly excluded from the jury panel is without merit.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DIRECTOR OF THE DEPARTMENT
OF CORRECTIONS, *Respondent*

By:

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CERTIFICATE OF SERVICE

I, Jacqueline G. Epps, Senior Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 13th day of April, 1983, three copies of the foregoing Brief in Opposition to the grant of a Writ of Certiorari were mailed, first-class postage prepaid, to Richard J. Wertheimer, Arnold & Porter, 1200 New Hampshire Avenue, N.W., Washington, D.C. 20036, Counsel of Record for Petitioner.

JACQUELINE G. EPPS
Senior Assistant Attorney General

APPENDIX A

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. .....

JAMES DYRAL BRILEY,

Petitioner,

v.

DIRECTOR OF THE DEPARTMENT
OF CORRECTIONS,

Respondent.

PETITION FOR APPEAL

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* * *

ASSIGNMENTS OF ERROR

1. The Court erred in ruling that the trial judge had properly admitted a statement obtained from the petitioner on the night of his arrest after he had requested the presence of an attorney.

2. The Court erred in ruling that petitioner was afforded effective assistance of counsel despite numerous serious errors and omissions by his trial counsel.

3. The Court erred in dismissing petitioner's other claims without a hearing. The Court erred (a) in ruling that petitioner had waived certain claims which trial counsel, through error and omission, failed to raise at trial or on direct appeal; and (b) in failing to reconsider the constitutionality of the death penalty and other issues raised on direct appeal.

APPENDIX B

BUREAU OF POLICE
RICHMOND, VIRGINIA

Date: 10-22-79
Time: 1145 2345

Name of Accused: James Dyral Briley

I am Detective Sgt. N. A. Harding of the Richmond, Virginia, Bureau of Police.

1. You are being interviewed in connection with the alleged commission of the crime of murders of Harvey Wilkerson, Jr., Dianne Barton & Harvey Barton. 3 Firearms charges . .

2. You have an absolute right to remain silent and make no statement to me and your silence will be guarded by the police.

3. Any statement you make without counsel can be used as evidence against you.

4. You have a right to the presence of an attorney during this or any future interview the police might have with you. The attorney may be one of your own choosing which you retain, or if you are without funds to employ counsel, the court will appoint one for you.

Do you understand the rights that have been explained to you? Yes J.B.

You may voluntarily waive the above rights that have been explained to you and make a statement if you so desire.

James Briley
Signature of Accused